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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
A DOMESTIC CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Viola Hall Moore, Administrator of the Estate of Louis Lee Moore, Jr., respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on the 10th day of October, 1950.

A

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. The decision of the United States Court of Appeals for the Fourth Circuit was rendered on August 10, 1950.

B

Summary Statement of Matter Involved

Petitioner's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake & Ohio Railway Company while both he and the Company were engaged in interstate commerce. He left a widow and four small children ranging in ages from three to ten years. She qualified on his estate and sued the Company for damages under the Federal Employers' Liability Act. Upon the trial of the case in the District Court, the jury rendered a verdict for the plaintiff in the sum of $34,000.00. Upon motion of the defendant, the verdict was set aside upon the *sole* ground that it was contrary to the evidence, and final judgment was entered for the defendant. This judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (Appellee's appendix pp. 33-38).

C

Question Presented

The sole question presented is whether the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial, by weighing the contradictory evidence, drawing inferences, judging the credi-

bility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury.

D

Reasons Relied On for Allowance of Writ

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States involving the right of petitioner to a jury trial under the Federal Employers' Liability Act.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered by that Court in this case on the 10th day of August, 1950, and that the said judgment be reversed by this Honorable Court, and that the case be remanded to the District Court with directions that judgment be entered on the verdict of the jury with interest from the 31st day of January, 1950, the date of the rendition of the verdict (Va. Code 8-223).

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SUPREME COURT OF THE UNITED STATES

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vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,

Defendant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Fourth Circuit (Appellee's appendix pp. 33-38) is reported in 183 F. 2d —.

The memorandum opinion of the District Court of the United States for the Eastern District of Virginia appears on pages 4 and 5 of the appendix to appellant's brief in the Court of Appeals.

II

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254. The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on August 10, 1950 (Appellee's appendix p. 38).

III

Statement of the Case

A statement of the case appears under heading "B" of the petition for the writ of certiorari. In the interest of brevity, this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV

Question Presented

The question specifically brought forward by the petition for a writ of certiorari appears under the heading "C" of the petition. Again, in the interest of brevity, it is not here repeated, but is referred to with the request that it be considered incorporated by reference.

V

Summary of Argument

The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as illusive here as in other fields. The jury has been chosen as the appropriate tribunal to apply those standards to the facts in personal injury cases. It is the

system which the Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away the goodly portion of the relief which Congress has afforded them. Only where there is a complete absence of probative facts to support the conclusion reached may the court take the case away from the jury. Such is not the case here, and the court erred in setting aside the verdict of the jury and entering final judgment for the defendant.

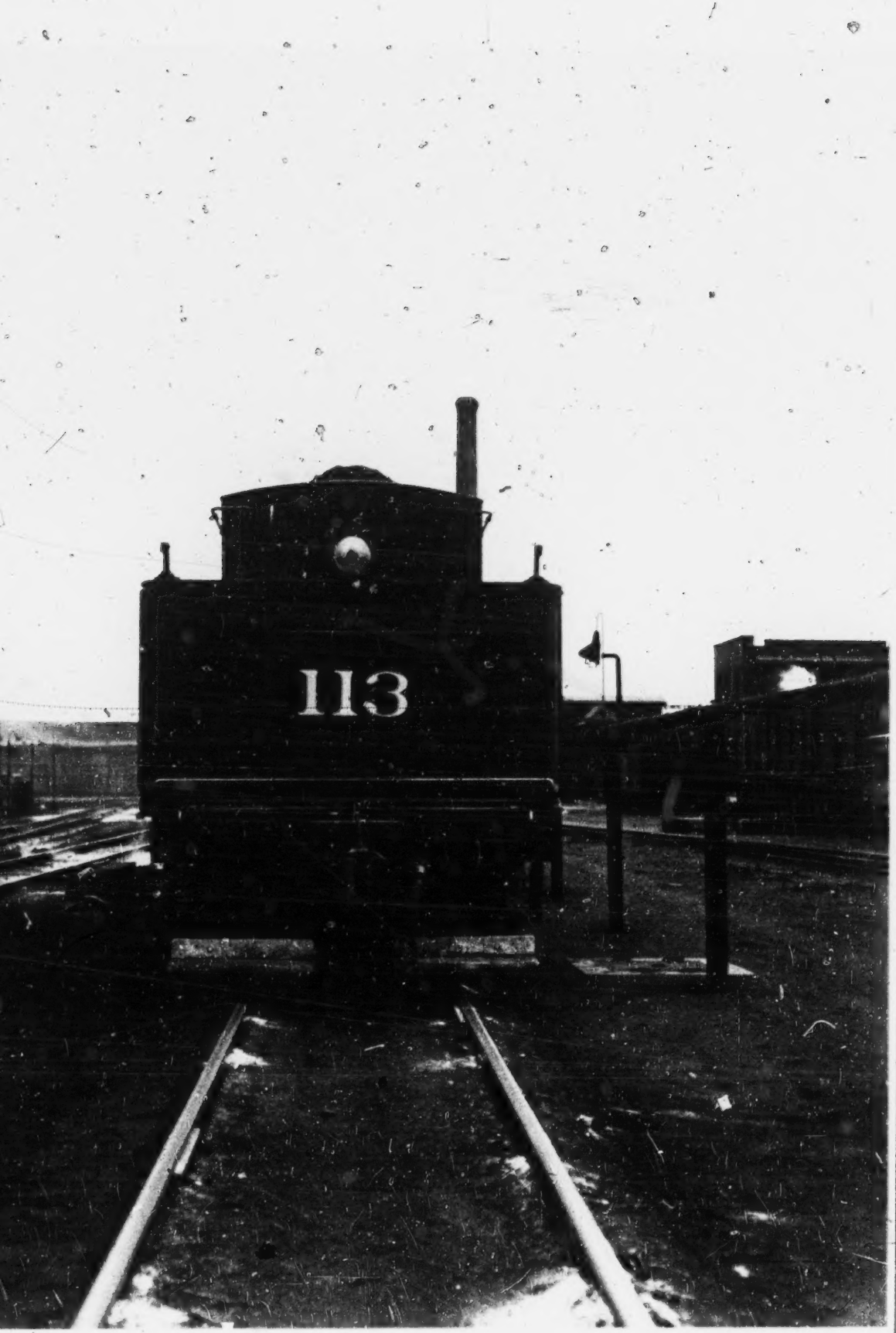
VI

Argument

The United States Court of Appeals, Fourth Circuit, recognized that proof by circumstantial evidence from which a jury might reasonably infer negligence and proximate cause is sufficient to support a verdict. But when the court undertook to apply this rule to the case in hand, it failed to give effect to the opinions of this Honorable Court on the subject of the right of railroad employees to a trial by jury under the Federal Employers' Liability Act. The Court, contrary to the purposes of the Act, proceeded to weigh contradictory evidence and inferences; to judge the credibility of witnesses and to draw conclusion from the facts proven contrary to those drawn by the jury. This will readily appear from a brief statement of the facts.

Plaintiff's decedent (whom we shall refer to as "Moore") lost his life on September 25, 1948, at about three p. m. while engaged as a brakeman in shifting operations on the Fulton Yards of defendant at Richmond. Moore was standing on the footboard behind the tender of Engine No. 114, where he was supposed to ride in the performance of his duties as brakeman (Appellant's appendix 19). For purposes of clarity, we reproduce here plaintiff's exhibit No. 1, page 138 of the complete record, showing the engine and tender of 113, which the testimony shows is identical with 114.

(Here follows 1 Photolithograph)


113

Facing the picture, Moore was riding on the footboard to the right with his back to the engine and tender. The engine was moving backward and Moore was facing in the direction in which the engine was moving. The edge of the footboard to Moore's left is exactly ten inches from the edge of the tender on that side (Appellant's appendix 38). He was standing behind the tender where he was supposed to stand in the performance of his duties (Appellant's appendix 19). He could not have stood closer to the edge of the tender on his left than 10 inches. The width of the tender is 10 feet, 1 inch; its height 9 feet, 7½ inches. The part of the tender which carries the coal projects still higher—3 feet and 11 inches at the side and 5½ feet higher at the center. The footboard on which Moore was standing was 1 foot and ½ of an inch above the top of the rail. From the top of the footboard to the top of the tender the distance was 8 feet and 7 inches (Appellant's appendix 37).

Wilds, the Engineer, was sitting on the engineer's seat box in the cab, with his back toward the direction in which he was moving, with his left hand on the throttle, his head turned to his right, looking back out of the window in the direction in which he was moving (Appellant's appendix 20-21). "I was looking out of the window", he said "and looking west to see if the switch were properly lined and there was anything on the leadback, as a usual thing, you know" (Appellant's appendix 31). He did not know whether he was going to take all of the thirty-three cars he was moving out through the switch at one time. "I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or *stop* and cut part of them off" (Appellant's appendix 31) (Emphasis supplied).

The engineer didn't recall whether there was at the time a switch tender on duty at the point where the switch track

comes out into the ladder (Appellant's appendix 29). (A switch tender is one who is required to throw switches (Appellant's appendix 29, 30).) The engineer couldn't recall whether the brakeman, Cliff Stephens, who sometimes acted as switch tender, was on duty that day (Appellant's appendix 30), nor did the engineer recall whether anyone was around the switch at the time "looking after that switch, immediately before the accident"—the one he was coming out of (Appellant's appendix 30). Wilds said that Moore was not in position to give him any signal "if that switch was not in place" (Appellant's appendix 33), and that Moore was not giving any signal at the time of the accident (Appellant's appendix 21). He said Moore gave the back-up signal from the footboard at the beginning of the operation (Appellant's appendix 21). Such signals are given, he said, from the footboard where Moore was standing by reaching out from behind the tender (Appellant's appendix 23, 24). Wilds further said that if Moore had given a signal while standing up straight on the footboard behind the tender, without reaching out from behind the tender, the signal could not have been seen by him (Appellant's appendix 24); and he said that when he saw Moore just before the accident, "He was standing up straight on that footboard" (Appellant's appendix 25). He said Moore was *not* in a position to give him any signal "if that switch was not in place" (Appellant's appendix 33).

Carl Torrence, plaintiff's expert, made measurements and took sight lines from the engineer's seat box with his left hand on the throttle, looking out of the window to the rear from a point as far as he could get his head out—with his left hand on the throttle. He said that he could not see a person standing on the footboard as Wilds said Moore was standing immediately before the accident (Appellant's appendix 41). See Plaintiff's Exhibit No. 6, showing the

measurements and sight-lines from the engineer's seat box to the point where Moore was standing.

The jury was taken to the scene of the accident where they were shown the engine No. 114 and allowed to make their own observations, and tests (Appellant's appendix 45).

The Court of Appeals says in its opinion, which is found, pages 5 to 12 of the transcript, "We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction, that he *could* see him."

In the first place, plaintiff's expert, Torrence, demonstrated mathematically by sight-lines, tests, and actual measurements, that the engineer could not see Moore. Torrence was asked if he made any tests for the purpose of determining whether the engineer could see Moore and he said he did. We quote from his testimony as follows:

> "Q. How far is the end of that footboard on which the deceased is said to have been standing to the outside of the tender?
>
> "A. The edge of the step is ten inches from the edge of the tender. * * *
>
> * * * * * * *
>
> "* * * if he (the engineer) had chosen to look out the side window you will see a dimension there nine inches plus or minus which is the most that he could have his eye projected beyond the side of the cab—his sight line from the side window would have been obstructed at the back corner of the tender which would have been that same ten inches from the edge of the step.
>
> * * * * * * *
>
> "Q. May I ask if you sat in the engineer's seat and tested the situation yourself?

"A. I did.

"Q. Tell us about your sight?

"A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured.

* * * * * * *

"* * * did you place anybody on the footboard?

"A. I did, sir.

"Q. In what position did you place him before you made your observation—standing upright?

"A. Standing upright, his foot on the edge of the step which was ten inches from the edge of the tender.

"Q. A man standing straight?

"A. Upright, straight. I could not see him when I put my head out of the side window.

"Q. Did you put your head out as far as you could see?

"A. As far as I could and still have my hand on the brake.

"Q. The throttle?

"A. The throttle, yes, sir" (Appellant's appendix pp. 37, 38, 39, 41, 42).

The engineer testified as follows:

"Q. When you first saw Mr. Moore back there was he standing up straight on that footboard?

"A. Yes, sir.

"Q. Did you see him do anything or make any motion or make any movement while he was still standing up straight?

"A. Yes, sir.

"Q. What did he do?

"A. He was standing up like that and he started to slump.

"Q. Straight down?

"A. As if his knees gave away like that, and straightened up.

"Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?

"A. Yes.

"Q. On that step?

"A. Yes.

"Q. You were at that time moving?

"A. I was.

"Q. West, as you said?

"A. Yes.

"Q. Then what did you do?

"A. I didn't do anything at that time.

"Q. You didn't do anything at that time.

"A. That is right.

"Q. What happened after that?

"A. You want me to tell about his falling off?

"Q. Yes.

"A. The next thing I notice, his body was hitting the ground and he come off the footboard in somersault position. He hit on the back part of his shoulder on the ground. His feet were laying in a westwardly position and kind of an angle to the track.

"Q. When he was in the somersault position was he behind the tender or outside?

"A. He had come a little bit to the outside, in other words, tumbling off.

"Q. How much of him was outside when you saw him in the somersault?

"A. I can't tell you how much of him. I saw his body when he hit the ground.

"Q. Was he clear of the engine when he turned the somersault, clear of the engine and tender?

"A. No, he wasn't clear.

"Q. Before he completed the somersault was he clear of it?

"A. I don't understand the question. Do you mean after he hit the ground was he clear of the engine, or what do you mean?

"Q. Let us illustrate it this way: Let us see, if you don't mind standing right here in front of Mr. Tilghman, and let us say this table is the outside of the engine and tender and the step is a little short of the engine and tender, the end of it. Do you know how many inches?

"A. No, I do not know exactly, but it is between four and six.

"Q. It lacks then from four to six inches, according to your recollection, of being out even with the outside of the engine and tender. Now then, you stand where you saw him when he slumped straight down and raised straight up and then turned a somersault and went on outside.

"A. With my back to him?

"Q. Whichever way the man was to you—Mr. Moore was to you.

"A. Standing in this position. He slumped like that as if his knees had given away. He righted himself and all in a second's time he come tumbling head foremost like this off of the engine and I seen his body when he hit the ground, on the back of his shoulder."

(Appellant's appendix pp. 25, 26, 27, 28, 29.)

The Court of Appeals comments on the testimony of the engineer as follows:

"Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes,' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.' It is worthy of note that these words were the words of counsel and not of the witness."

The engineer was asked to stand in front of the jury behind a table; assume the table to be the tender of the engine and then illustrate before the jury the position of Moore when he saw him and just exactly how Moore slumped straight down and then raised himself straight up.

The witness then stood up straight and slumped straight down and raised himself up straight before the jury, just exactly as he said Moore had done.

If the words of the witness were the words of counsel and not of the witness, the actions of the witness before the jury when he slumped straight down and then raised himself straight up were not the actions of counsel. Counsel did not lay hands upon him and press him straight down. Nor did he catch hold of the witness and raise him straight up.

It is a part of the art of cross-examination for the cross-examiner to put words in the mouth of the witness, if he can do so. If the cross-examiner can get the witness to agree with him by the asking of leading questions, that is the cross-examiner's right. The case was tried before an able and experienced judge, with able and experienced trial counsel for the defense. If counsel for the plaintiff had exceeded the bounds of propriety, he would have been stopped.

The engineer had made statements upon a pre-trial examination. When called to the witness-stand, he endeavored to weaken the force of his previous statements. It was, therefore, the right of the cross-examiner to point out his former statements and seek to force the witness to admit, not only that he made the statements, but that they were true. Indeed, the proper way to examine a witness about his previous testimony is to call the previous testimony directly to the attention of the witness in the words in which it was given and ask him if he did not so testify. Unless such a foundation is laid, counsel will not be permitted to contradict a witness. If such a cross-examination amounts to "verbal gymnastics not favored in the law", then all good cross-examiners are guilty of "verbal gymnastics."

Wilds, the engineer, was the only eye witness to the accident known to the plaintiff. Consequently, she had no choice but to introduce him. He was therefore called by the plaintiff as an adverse witness and examined according to the rules applicable to the examination of such a witness. Virginia Code, Section 8-291. *Murphys Hotel* v. *Cuddy's Administrator*, 124 Va. 207, 97 S. E. 794. The mere fact that the engineer was called by the plaintiff did not bind the jury to accept *all* of his evidence. *Chicago, etc.* v. *Grauel*, 160 F. 2d 820. It was still in the province of the jury to pass upon the inconsistency or truthfulness of his statements and give or withhold its assent to the truthfulness of the particular statement as it saw fit. *Liberty Mutual Insurance Company* v. *Tiller*, 189 Va. 544, 53 S. E. 2d 814; *Atlantic Greyhound Corporation* v. *Shelton*, 184 Va. 684, 36 S. E. 2d 625; *Robert Jackson and others* v. *Victor Blue*, 153 F. 2d 67.

In the statement of the court to the effect that any straightforward witness, "if asked whether the figure of a man shown in the photograph alluded to above was standing up straight, would naturally answer, 'yes'," the court was referring to the photograph, defendant's exhibit B, p. 144 of the complete record. We here reproduce the photograph.

(Here follows 1 Photolithograph).

It plainly appears that the photograph was taken from an angle with the camera focused on the corner of the tender, the man standing with his left foot over the edge of the step, his right hand holding to a grab iron and his body leaning to his left, so that his shoulder appears to extend beyond the edge of the tender. The picture is so distorted that the footboard on which the man is standing appears to extend over the iron rail on that side only about half as far as the footboard appears to extend beyond the rail on the other side. The inside end of the footboard on which the man is standing appears to extend practically to the middle of the rails of the track, while the other footboard appears to be almost entirely on the outside of the rail, and yet, the court says any straightforward witness if asked whether the figure of a man shown in the photograph was "standing up straight," would normally answer "yes." We submit that no straightforward witness would say that the man shown in this photograph was "standing up straight." It is clear that he is leaning to the outside and holding on to the rail to keep from falling. His left foot is partly over the end of the footboard and his right foot is only a few inches from the edge. From this evidence the court says that the engineer could see Moore. *But* there is no evidence that Moore was standing in any such position. Moreover, the taking of the photograph from the angle from which it was taken, with the camera focused on the corner of the tender, makes it *appear* that the engineer could see more than he could in fact see.

A photograph taken in the ordinary way usually is an accurate record of the image cast by the lens upon the film, but as distortion is possible through the manner in which the camera or negative is used, before a photograph is admitted in evidence there should always be preliminary proof that it is a correct representation of the subject. No such

proof was offered in this case with reference to photograph designated as "Defendant's Exhibit B." The general rule is that after a photograph has been verified and admitted in evidence, the jury should determine what credit or weight should be given it as evidence. Photographic Evidence by Scott, page 496.

The rules for creating accurate photographs of accident scenes or objects are not complicated, but they are important. Different impressions may be created by merely turning the camera to the right or left in order to show a slightly different view. For instance, let us assume that an automobile collision occurs at a city intersection. One of the drivers, contending his view was obstructed in such a way that he could not see the other car approaching on the intersecting street, presents a photograph tending to support his theory. In this picture it appears that the view of the intersection would be obstructed by the building at the right. The camera was simply placed in such a position that the building on the extreme right appeared to obstruct the view. Another photograph made with the camera turned more to the right shows that because of its unique construction the building really does not create a blind intersection. See Photographic Evidence, Scott, pp. 61, 62, 63.

In the present case, defendant's photograph Exhibit B was created with the camera turned and placed so as to show that the engineer could see Moore, but the view represented by the photograph was not correct. The jury ignored it, and the appellate court had no right to regard it as controlling.

The court does not even mention the unimpeachable testimony of Torrence, illustrated by plaintiff's exhibit 6, showing the sight-lines and measurements by accurate mathematical calculations. This testimony demonstrates that the

engineer could *not* see Moore, if Moore was standing where the engineer said he was standing.

It was conceded that Moore lost his life while he and defendant were both engaged in interstate commerce. It is conceded that he was performing his duties as a brakeman, and that he was riding on the rear of the tender of the engine No. 114 in the performance of his duties. The engineer was backing in a westerly direction about five miles per hour, pulling thirty-three cars, intending to come out of track No. 12 into the ladder track, Moore having given the back-up signal by hand by reaching from behind the tender while standing on the footboard. He continued to ride there, which was where he was supposed to ride. He could not be seen while thus riding except when he was reaching out from behind the tender giving a signal. He had not given any signal since he gave the back-up signal at the beginning of the movement. He was not in a position to give any signal if the switch was not in place. The engineer was looking west to see "if the switch were properly lined and there was anything on the lead back". He didn't know whether they intended to take all of the thirty-three cars out through the switch at one time, or to *stop* and cut a part of them off, since he had received no signal. There was no switch tender on duty at the point where switch track No. 12 comes into the ladder track. There was no one near the switch track at the time "looking after the switch immediately before the accident".

The jury had a right to infer that the engineer, not seeing Moore on the footboard (since he was not reaching out giving any signal) and not seeing a switch tender or anyone else around the switch and not knowing whether they intended to take all of the thirty-three cars out of the switch at one time, or stop and cut some of them off, decided to make an emergency stop. He did in fact make such

a stop, without any notice whatsoever to Moore. The jury had a right to infer that the sudden, unexpected stop threw Moore forward from the footboard on the tender and that the engineer did not see him until his falling body had emerged from behind the tender and was "hitting the ground." "I saw his body when it hit the ground," the engineer said.

It is true the engineer said he saw Moore just before he fell and that he was standing up straight on the footboard behind the tender; that he started to slump straight down behind the tender as if his knees gave way; that he straightened up, still straight behind the tender and "the next thing he noticed his body was hitting the ground," "a little bit to the outside" of the engine, and that he "applied the brakes just as the body was hitting the ground." But the jury did not have to believe this part of the engineer's testimony, because it was in conflict with his several admissions that he could not see Moore while on the footboard unless he was reaching out from behind the tender giving a signal and that he had not given any signal since giving the back-up signal at the beginning of the operation. Such testimony was also in conflict with that of Torrence which was to the effect that it was physically impossible for the engineer to have seen Moore standing up straight on the footboard, as the engineer said he was standing. The jurors were allowed to view and inspect the engine and tender and make their own tests to determine whether the engineer could have seen Moore. Their verdict indicated the result of their own observations and tests.

The Court of Appeals said "there is no evidence of any kind to contradict the engineer in the statement that he stopped because he saw Moore fall." We respectfully submit that there is the evidence of Torrence and the map filed

by him showing sight observations and measurements to the effect that it was impossible for the engineer to have seen Moore. There was the evidence which the jurors themselves saw upon their own inspection and the results of their own tests and observations and there was the admission of the engineer that Moore was not in a position to give him any signal; that to give a signal he would have to reach out beyond the tender and he was not doing anything of the kind.

The Court of Appeals says that no fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony. We have pointed out the several conditions which obtained, namely, that the engineer was "looking west to see if the switch were properly lined and there was anything on the lead track as a usual thing, you know"; that he didn't know whether they intended to take all thirty-three cars "out and switch them or *stop* and cut part of them off," since he had received no signal; that he couldn't recall whether a switch tender was on duty at the point where the switch track No. 12 comes into the ladder track; that he couldn't recall whether anyone was near the switch at that time "looking after the switch immediately before the accident", and that he could not see Moore on the footboard, unless he was giving a signal. This combination of circumstances and conditions may have caused the engineer to stop unexpectedly. At any rate, if the jury believed that he testified falsely when he said he could see Moore standing up straight, then slump straight down, and raise straight up again, after which he tumbled off, the jury were forced to the conclusion that he suddenly stopped for some reason other than seeing Moore fall and that Moore fell as a result of the unexpected stop.

The inferences to be drawn from these circumstances were

strengthened by the failure of the defendant to call Holland, the conductor who was in charge of the shifting operation. Such failure gave rise to a presumption or inference that had he testified, his testimony would have been against the defendant. In *Puckett, et al.* v. *Draper,* 158 S. E. 68, 156 Va. 238, it is said:

> "'It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed and all questions as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth.'
>
> "In Wigmore on Evidence, vol. 1 § 285, it is said: 'The non-production of evidence that would naturally have been produced by an honest and, therefore, fearless, claimant, presents the inference that its tenor is unfavorable to the party's cause.' "

Holland was the conductor in charge of the train. The engineer was subject to his orders. If the conductor gave no order to stop the train, and the engineer made an emergency stop *without any orders,* should not the defendant have called the conductor to testify to that effect? Does not the defendant's failure to call him give rise to a presumption or inference that no emergency stop was made; that the stop was made upon the order of the conductor? And is not such a presumption or inference evidence upon which a jury may base a verdict? The decided cases answer the question in the affirmative.

In *Lavender* v. *Kurn,* 327 U. S. 645, 66 Sup. Ct. 740, the deceased was struck on a dark night in the back of the head and killed. There were no eye witnesses. Plaintiff claimed that the deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of the backing train. This end was seventy-three inches above the top of the rail,

which was seven inches high. The end of the mail hook would sometimes swing out twelve to fourteen inches from the rail and seventy-three inches above the top of the rail. The deceased was only sixty-seven and one-half inches tall. Near the switch where the duties of the deceased required his presence was a mound of cinders and dirt rising at its highest points eighteen to twenty-four inches above the top of the rail. If the deceased had been standing on the mound about a foot from the side of the mail car, he could have been hit by the end of the mail hook. The defendant's theory was that the deceased was murdered. The jury found for the plaintiff in the sum of $30,000.00. Judgment was entered accordingly. On appeal the Supreme Court of Missouri reversed the judgment. Certiorari was granted by the Supreme Court of the United States and upon the hearing the Missouri Supreme Court was reversed. Mr. Justice Murphy, speaking for the Court, among other things, said:

> "The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that 'it could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches.' (189 S. W. 2d 255.) But it held that 'all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook' and that 'plaintiff failed to make a submissible case on that question.' It also ruled that there 'was no substantial evidence that the uneven ground and insufficient light were cause or contributing causes of the death of Haney.' "
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> "The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney

in the back of the head, and inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made the inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

> are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The following cases also support our contention: *Gray* v. *Southern Pacific Company*, 145 P. 2d 561; *Tennant* v. *Peoria etc. Ry. Co.*, 54 Sup. Ct. 409; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378; *Stanford* v. *Penn. R. Co.*, 171 F. 2d 632.

In the *Gray* case, plaintiff's theory was that the deceased was knocked from the top of a box car while in the performance of his duties as a brakeman by the stopping of the train without warning. It was the defendant's claim that the stop was made to ascertain the whereabouts of the deceased when the engineer could not see him. In the *Kurimsky* case, a brakeman was killed during switching operations when he was jolted off one of the cars as a result of the engineer making a sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement.

This Honorable Court, commencing with *Tiller* v. *Atlantic Coast Line Company*, 318 U. S. 54, in a succession of cases, has reversed almost every court which has held that a defendant was entitled to a directed verdict. In the *Tiller* case, this Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the Dis-

trict Court in directing a verdict. The case, upon remand, was again tried in the Court below, where a directed verdict was denied. For this denial the Court of Appeals reversed and again this Court reversed the Court of Appeals, holding that the District Court properly submitted the case to the jury. In *Tennant* v. *Peoria etc. Ry. Co.*, 321 U. S. 29, the Court of Appeals for the Seventh Circuit reversed the District Court on account of its refusal to direct a verdict and the decision of that court, 134 F. 2d 860, was reversed by this Court. In *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, the Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and this Court reversed the decision of that court. In *Blair* v. *Baltimore & Ohio R. R. Co.*, 321 U. S. 600, this Court reversed the Supreme Court of Pennsylvania, which had held that there should have been a directed verdict. In *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740 (Mch. 25, 1946), this Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants. In the recent case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 Sup. Ct. 413, decided January 31, 1949, the trial court directed a verdict for the defendant and the State Supreme Court affirmed. This Court reversed the State Supreme Court.

It will be thus seen that this Honorable Court treats the question of negligence and proximate cause as a jury question in this class of cases. Moreover, not only are these issues to be decided by a jury, but its decision is unassailable. In view of the decisions of this Honorable Court, it is in fact difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict. It seems that the Court of Appeals for the Fourth Circuit fails to appreciate the length to which this Honorable Court has gone in its decisions on this subject.

See *Fore* v. *S. Ry. Co.*, 178 F. 2d 349, where the Court again denied a railroad worker the right of a trial by jury:

See also in this connection "Recent Trends in Judicial Interpretations in Railroad Cases under the Federal Employers' Liability Act," by Moore, 29 Marquette L. Rev. 73.

It is respectfully submitted that both the District Court and the Court of Appeals erred in setting aside the verdict of the jury and entering final judgment for the defendant.

VII

Conclusion

In conclusion, counsel for petitioner, respectfully submits that for the reasons herein set forth, a writ of certiorari should be granted the petitioner and that this Court should review and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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